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No. 99-1240

In the Supreme Court of the United States

UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, ET AL., PETITIONERS

v.

PATRICIA GARRETT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether Titles I and II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12111 to 12117, 12131 to 12165 (1994 & Supp. III 1997), are proper exercises of Congress's power under Section 5 of the Fourteenth Amendment.

2. Whether petitioners are subject to suits under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, either because petitioners waived their Eleventh Amendment immunity when they applied for and accepted federal financial assistance that Congress expressly conditioned upon a waiver of Eleventh Amendment immunity, or because Congress has validly abrogated petitioners' immunity from suits under Section 5 of the Fourteenth Amendment.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-48) is reported at 193 F.3d 1214. The opinion of the district court (Pet. App. 49-55) is reported at 989 F. Supp. 1409.

JURISDICTION

The court of appeals entered its judgment on October 26, 1999. The petition for a writ of certiorari was filed on January 24, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, is a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42

U.S.C. 12101(b)(1). Based on extensive study and fact-finding by Congress,[1] and Congress's lengthy experience with the analogous nondiscrimination requirement in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, Congress found in the Disabilities Act that:

> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
>
> * * * * *
>
> (5) individuals with disabilities continually encounter various forms of discrimination, including

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[1] Fourteen congressional hearings and 63 field hearings by a special congressional task force were held in the three years prior to passage of the Disabilities Act. See S. Rep. No. 116, 101st Cong., 1st Sess. 4-5, 8 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 24-28, 31 (1990); *id.* Pt. 3, at 24-25; *id.* Pt. 4, at 28-29; see also Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 393 & nn.1-3 (1991) (listing the individual hearings). Congress also drew upon reports submitted to Congress by the Executive Branch. See S. Rep. No. 116, *supra*, at 6 (citing United States Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* (1983); National Council on Disability, *Toward Independence* (1986); and National Council on Disability, *On the Threshold of Independence* (1988)); H.R. Rep. No. 485, *supra*, Pt. 2, at 28 (same).

> outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;
>
> (6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally; [and]
>
> (7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4).

The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by em-

ployers; Title II, 42 U.S.C. 12131-12165 (1994 & Supp. III 1997), addresses discrimination by governmental entities; and Title III, 42 U.S.C. 12181-12189 (1994 & Supp. III 1997), addresses discrimination in public accommodations operated by private entities.

This petition involves two suits brought under Titles I and II of the Disabilities Act and Section 504 of the Rehabilitation Act of 1973. Title I provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). A "covered entity" is defined to include any "person engaged in an industry affecting commerce who has 15 or more employees," 42 U.S.C. 12111(2) and (5)(A), and the term "person" incorporates the definition from Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which includes States. 42 U.S.C. 12111(7); cf. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 449 & n.2 (1976). The prohibition on discrimination may be enforced through private suits against public entities. See 42 U.S.C. 12117(a) (incorporating the enforcement provisions of Title VII); cf. *Fitzpatrick*, 427 U.S. at 452.

Title II of the Disabilities Act provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is expressly defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A) and

(B). The prohibition on discrimination may be enforced through private suits against public entities. See 42 U.S.C. 12133; see also *Olmstead* v. *L.C.*, 119 S. Ct. 2176, 2182 (1999).

Congress intended the Disabilities Act to supplement, not supplant, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which addresses discrimination against persons with disabilities by programs or activities receiving federal financial assistance. See 42 U.S.C. 12201(b) (nothing in the Disabilities Act "shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law * * * that provides greater or equal protection for the rights of individuals with disabilities").[2] Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * * " 29 U.S.C. 794(a). A "program or activity" is expressly defined to include "all of the operations" of "a department, agency, special purpose district, or other instrumentality of a State or local government." 29 U.S.C. 794(b). The prohibition on discrimination may be enforced through private suits against public entities. See 29 U.S.C. 794a(a)(2); cf. *Olmstead*, 119 S. Ct. at 2182 n.4.

In both the Disabilities Act and the Rehabilitation Act, Congress expressly removed the States' Eleventh

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[2] Subsequently, Congress amended its findings underlying the Rehabilitation Act to conform, in large part, to those of the Disabilities Act. See Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 101, 106 Stat. 4346 (codified at 29 U.S.C. 701).

Amendment immunity from private suits in federal court. 42 U.S.C. 12202 (a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter"); 42 U.S.C. 2000d-7(a)(1) (a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973").

2. Respondent Garrett has worked for petitioner University of Alabama since 1977. In August 1994, respondent was diagnosed with breast cancer and underwent a lumpectomy and continued radiation and chemotherapy treatment through January 1995. Respondent's supervisor made negative comments regarding her illness and told her she would be permanently replaced unless she took leave. Partially in response to those actions, and on the advice of her doctor, respondent took four months leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* On her return in July 1995, it was initially agreed that respondent would continue in her previous position because she remained able to perform the essential functions of her work. Approximately one week later, however, petitioner demoted her to a position with a significantly lower salary. Pet. App. 9; Garrett Compl. ¶¶ 8-11, 16.

Respondent Ash has worked for petitioner Alabama Department of Youth Services since 1993. He has several impairments, including severe chronic asthma, that substantially limit his ability to breathe. He informed his supervisor of his disability and of his doctor's recommendation that he not be exposed to carbon monoxide or other noxious fumes, such as cigarette

smoke. However, petitioner refused to enforce its previously adopted non-smoking policy and required respondent to drive cars which leaked carbon monoxide fumes into the passenger compartment. After respondent filed a complaint with the Equal Employment Opportunity Commission (EEOC) concerning petitioner's failure to accommodate his respiratory disability, petitioner took adverse employment action against him. Ash Compl. ¶¶ 5-12.

Respondents filed separate suits in the same district court, alleging that petitioners had violated Titles I and II of the Disabilities Act, Section 504 of the Rehabilitation Act, and (for respondent Garrett) the Family and Medical Leave Act. Petitioners filed motions to dismiss on Eleventh Amendment grounds. The district court issued a single opinion dismissing both cases on the ground that none of the statutes validly abrogated petitioners' Eleventh Amendment immunity. Pet. App. 49-55.

3. The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of Congress's removal of Eleventh Amendment immunity. The court of appeals reversed in pertinent part. Pet. App. 1-49.[3] The Eleventh Circuit had previously upheld the abrogation of immunity in the Disabilities Act, and invalidated the abrogation of immunity in the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, in *Kimel* v. *Florida Board of Regents*, 139 F.3d 1426 (11th

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[3] The panel affirmed the district court's judgment that Congress did not validly abrogate the States' Eleventh Amendment immunity in the Family and Medical Leave Act. Pet. App. 8-13. Judge Cook dissented from that aspect of the court's holding. *Id.* at 13-48. Neither the United States nor respondents seek further review of that portion of the court of appeals' judgment.

Cir. 1998), aff'd with respect to the Age Discrimination in Employment Act, 120 S. Ct. 631 (2000), cert. granted with respect to the Disabilties Act *sub nom. Florida Department of Corrections* v. *Dickson*, 120 S. Ct. 976 (2000), cert. dismissed, No. 98-829, 2000 WL 215674 (Feb. 23, 2000). Following its prior ruling in *Kimel*, the court of appeals here upheld the Disabilities Act's abrogation of Eleventh Amendment immunity. Pet. App. 6. The court also held that the analysis adopted in *Kimel* compelled it to uphold the abrogation of Eleventh Amendment immunity for Section 504, as "[t]he statutes serve the same purpose and were born of the same history of discrimination." *Id.* at 7.[4]

ARGUMENT

1. This Court should grant the petition for a writ of certiorari limited to Question 1. On January 21, 2000, this Court granted a writ of certiorari in *Florida Department of Corrections* v. *Dickson*, No. 98-829, to address the validity of the abrogation of the States' Eleventh Amendment immunity to suits under Title I of the Disabilities Act. On January 25, 2000, the Court granted a writ of certiorari in *Alsbrook* v. *Arkansas*, No. 99-423, to address the validity of the abrogation of the States' Eleventh Amendment immunity to suits under Title II of the Disabilities Act. On February 23, 2000, and March 1, 2000, the writs of certiorari in No. 98-829 and No. 99-423, respectively, were dismissed in light of the parties' settlement of the cases.

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[4] Having upheld the Rehabilitation Act's abrogation provision as a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, the court did not address whether the State had waived its Eleventh Amendment immunity by accepting federal funds conditioned on such a waiver.

a. As reflected in this Court's prior grants of writs of certiorari to address the immunity issue in both Title I and Title II earlier this year, the validity of the abrogation for both Titles of the Disabilities Act is ripe for review by this Court because there is an entrenched split in the circuits with respect to both Titles and because the constitutional question presented is of great importance.

Following this Court's decisions in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), four courts of appeals held that the abrogation of Eleventh Amendment immunity contained in the Disabilities Act is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to "enforce" the Equal Protection Clause. See *Amos* v. *Maryland Dep't of Pub. Safety & Correctional Servs.*, 178 F.3d 212 (4th Cir. 1999) (Title II), vacated for reh'g en banc (Dec. 28, 1999), appeal dismissed due to settlement, 2000 WL 248707 (Mar. 6, 2000); *Kimel* v. *Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998) (Title I), rev'd in part, 120 S. Ct. 631 (2000), cert. granted *sub nom. Florida Dep't of Corrections* v. *Dickson*, 120 S. Ct. 976 (2000), cert. dismissed, No. 98-829, 2000 WL 215674 (Feb. 23, 2000); *Coolbaugh* v. *Louisiana*, 136 F.3d 430 (5th Cir.) (Title II), cert. denied, 119 S. Ct. 58 (1998); *Clark* v. *California*, 123 F.3d 1267 (9th Cir. 1997) (Title II), cert. denied, 524 U.S. 937 (1998); see also *Torres* v. *Puerto Rico Tourism Co.*, 175 F.3d 1, 6 n.7 (1st Cir. 1999) (in Title I case, court states "we have considered the issue of Congress's authority sufficiently to conclude that, were we to confront the question head-on, we almost certainly would join the majority of courts upholding

the provision").[5] The en banc Eighth Circuit invalidated the Disabilities Act's abrogation of Eleventh Amendment immunity in a case arising under Title II of that Act. See *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (1999), cert. granted in part, 120 S. Ct. 1003 (2000), cert. dismissed, No. 99-423, 2000 WL 230234 (Mar. 1, 2000), and subsequently extended its holding to Title I of the Act, see *DeBose* v. *Nebraska*, 186 F.3d 1087 (1999), petition for cert. pending, No. 99-940.

In addition to the Eleventh Circuit in this case, three other courts of appeals have considered or reconsidered the validity of the Disabilities Act's abrogation after the Eighth Circuit's decisions and this Court's decision last term in *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 119 S. Ct. 2199 (1999), and all have rejected the Eighth Circuit's holding and have upheld the Disabilities Act's abrogation as valid Section 5 legislation. See *Dare* v. *California*, 191 F.3d 1167 (9th Cir. 1999) (Title II), petition for cert. pending, No. 99-1417; *Martin* v. *Kansas*, 190 F.3d 1120 (10th Cir. 1999) (Title I); *Muller* v. *Costello*, 187 F.3d 298 (2d Cir. 1999) (Title I).

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[5] The Seventh Circuit upheld the Disabilities Act's abrogation prior to this Court's decision in *Flores*, *supra*. See *Crawford* v. *Indiana Dep't of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997) (Title II). The continuing vitality of *Crawford* has been challenged in a case arising under Title I, *Erickson* v. *Board of Governors of State Colleges & Universities*, No. 95 C 2541, 1998 WL 748277 (N.D. Ill. Sept. 30, 1998), appeal pending, No. 98-3614 (7th Cir.) (oral argument heard April 27, 1999). The constitutionality of the Disabilities Act's abrogation for both Titles I and II is also pending in a number of cases before the Sixth Circuit, for which a consolidated oral argument was heard on October 24, 1999. See, *e.g.*, *Nihiser* v. *Ohio EPA*, 979 F. Supp. 1168 (S.D. Ohio 1997), appeal pending, No. 97-3933.

Furthermore, after this Court's decision in *Kimel* v. *Florida Board of Regents*, 120 S. Ct. 631 (2000), the Second Circuit again upheld the constitutionality of the Disabilities Act's abrogation in two cases arising under Title I of the Act. See *Kilcullen* v. *New York State Dep't of Labor*, No. 99-7208, 2000 WL 217465 (2d Cir. Feb. 24, 2000); *Jackan* v. *New York State Dep't of Labor*, No. 98-9589, 2000 WL 241648 (2d Cir. Mar. 3, 2000).

The question of Congress's authority to abrogate the States' Eleventh Amendment immunity for Titles I and II of the Disabilities Act has thus been extensively evaluated and considered by the courts of appeals. The conflict is firmly entrenched and incapable of resolution absent intervening action by this Court. As a consequence of the split in the circuits, moreover, the operation of this important civil rights legislation has been significantly impaired in seven States. Unlike litigants in the six circuits where the Disabilities Act's abrogation of Eleventh Amendment immunity has been sustained, persons with disabilities in the Eighth Circuit cannot fully enforce their federal rights under the Disabilities Act in federal court.

b. The present case provides the most appropriate vehicle to address these issues, among the several petitions currently pending before the Court. The case was decided on a motion to dismiss. That clean record permits straightforward and comprehensive consideration of the constitutional questions presented, without simultaneously requiring consideration of the occasionally difficult statutory construction questions posed by the Act. The discrimination, reasonable accommodation, and retaliation claims made by the petitioners, moreover, present a comprehensive overview of both the Act's practical operation and the types of dis-

crimination persons with disabilities encounter in the government workplace. Finally, it contains claims under both Title I and Title II of the Act.[6]

A petition for a writ of certiorari is also pending in *Zimmerman* v. *Oregon Department of Justice*, No. 99-243, which presents the question of the constitutionality of the abrogation for Title II of the Disabilities Act. As we previously stated in our Consolidated Supplemental Brief for the United States at 12, *Florida Dep't of Corrections* v. *Dickson*, No. 98-829, et al. (filed Jan. 13, 2000), *Zimmerman* is a problematic vehicle for a number of reasons. First, the Eleventh Amendment immunity question is a late arrival to the litigation. It was raised for the first time by the plaintiff—not the State—in his petition to this Court. It thus was not addressed by either the district court or the court of appeals. The State, moreover, adopted the assertion of immunity only after this Court called for a response to the petition. The abrogation question thus arises in an extraordinary posture where a State's Eleventh Amendment immunity is presented in the litigation for the first time by a private party who does not believe immunity attaches, and the immunity issue is only belatedly adopted by the State. Cf. *Wisconsin Dep't of Corrections* v. *Schacht*, 524 U.S. 381, 389 (1998) ("The Eleventh Amendment * * * does not automatically destroy original jurisdiction. * * * Unless the State

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[6] For those reasons this case is a better vehicle than *DeBose* v. *Nebraska*, 186 F.3d 1087 (8th Cir. 1999), petition for cert. pending, No. 99-940. *DeBose* presents only a Title I claim. Moreover, *DeBose* arises from a lengthy jury trial, and the content, character, and strength of the evidence presented have never been summarized or reviewed by any of the lower court opinions. Therefore the Court may prefer to hold *DeBose* for a decision in *Garrett*.

raises the matter, a court can ignore it.") (citations omitted); see also *id.* at 393-394 (Kennedy, J., concurring).

Second, *Zimmerman* would require resolution of the additional question whether Title II applies to employment decisions at all, a question on which the circuits are also divided. See *Davoll* v. *Webb*, 194 F.3d 1116, 1130 (10th Cir. 1999) (collecting cases). The cases involved in this petition, by contrast, do not necessitate resolution of that question because Eleventh Amendment immunity was the sole basis for the district court's ruling, it was the only issue pressed by respondents in the court of appeals, and it was the sole ground for the court of appeals' decision. Thus, this Court could affirm or reverse the court of appeals' judgment that the district court had jurisdiction over the Title II claim without deciding whether plaintiffs stated a claim. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction"); cf. *Olmstead*, 119 S. Ct. at 2183 (interpreting regulation without addressing its underlying validity or constitutionality). In contrast, the Court would be unable to avoid the issue in *Zimmerman* because the statutory construction issue was the basis for petitioner's loss in the court of appeals and would have to be reversed in order for him to be entitled to further proceedings.[7]

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[7] A petition is also pending in *Brown* v. *North Carolina Division of Motor Vehicles*, No. 99-424. As we explained in our Brief in Opposition in *Brown* (at 9-16), that case raises the quite narrow question of whether a particular Justice Department regulation as applied to an infrequently recurring factual scenario and premised on an unsettled construction of the regulation can be sustained under the Section 5 power. Indeed, a panel of the

2. No further review of the second question presented is warranted. Petitioners correctly note (Pet. 9) that a split exists in the courts of appeals as to whether Congress, pursuant to the Fourteenth Amendment, validly abrogated the States' Eleventh Amendment immunity for claims under Section 504 of the Rehabilitation Act. Compare *Kilcullen* v. *New York State Dep't of Labor*, No. 99-7208, 2000 WL 217465, at *5 (2d Cir. Feb. 24, 2000) (upholding the abrogation for Section 504 as a valid exercise of the Fourteenth Amendment); *Clark* v. *California*, 123 F.3d 1267, 1270 (9th Cir. 1997) (same), cert. denied, 524 U.S. 937 (1998); *Crawford* v. *Indiana Dep't of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997) (same), with *Bradley* v. *Arkansas Dep't of Educ.*, 189 F.3d 745, 755-756 (8th Cir.) (holding that Section 2000d-7 is not a valid abrogation for Section 504), vacated in other part for reh'g en banc *sub. nom. Jim C.* v. *Arkansas Dep't of Educ.*, 197 F.3d 958 (8th Cir. 1999).

This Court need not resolve the question of whether Section 504 reflects a proper exercise of Congress's Section 5 power to abrogate immunity because the removal of immunity must, in any event, be sustained as a congressionally required waiver imposed as a condition upon the receipt of federal financial assistance.[8]

Fourth Circuit, in a now vacated opinion, subsequently upheld the Disabilities Act's abrogation of immunity in another Title II case and limited *Brown* to its facts. See *Amos*, 178 F.3d at 221 n.8. *Brown* thus does not present an appropriate vehicle for consideration of the important constitutional issues raised by this petition. We are serving a copy of this brief on counsel in the *DeBose*, *Zimmerman*, and *Brown* cases.

[8] Petitioner University of Alabama admitted it was a recipient of federal financial assistance. Garrett Compl. ¶ 4; Garrett Ans. ¶ 4. Petitioner Alabama Department of Youth Services has not

Section 504 was modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* "Under * * * Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision." *United States Dep't of Transp.* v. *Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986).

In response to this Court's decision in *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985), holding that Section 504 was not clear enough to evidence Congress's intent to authorize private damages actions against state entities, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845. Section 2000d-7 provides, in pertinent part:

> A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

Before the court of appeals, respondents argued that Section 2000d-7 could be upheld on the ground that

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yet responded to the allegation that it was a recipient of federal financial assistance, Ash Compl. ¶ 4; Ash Ans. ¶ 4.

petitioners had waived their Eleventh Amendment immunity by accepting federal funds after the effective date of Section 2000d-7. See Gov't C.A. Br. 37-38; Appellants Br. 20-21. That position is consistent with this Court's recognition in *Alden* v. *Maine*, 119 S. Ct. 2240 (1999), that "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits." 119 S. Ct. at 2267 (citing *South Dakota* v. *Dole*, 483 U.S. 203 (1987)). Similarly, in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999), this Court reaffirmed that Congress can condition the exercise of one of its Article I powers (the approval of interstate compacts) on the States' agreement to waive their Eleventh Amendment immunity from suit. *Id.* at 2231 (reaffirming *Petty* v. *Tennessee Mo. Bridge Comm'n*, 359 U.S. 275 (1959)). The Court also indicated that Congress retained the authority under the Spending Clause to condition the receipt of federal funds on the States' waiver of Eleventh Amendment immunity. 119 S. Ct. at 2231; see also *id.* at 2227 n.2. This Court explained that, unlike Congress's power under the Commerce Clause to regulate "otherwise lawful activity," Congress's power to authorize interstate compacts and spend money was the grant of a "gift" on which Congress could place reasonable conditions that a State was free to accept or reject. *Id.* at 2231.

While the court of appeals here did not address the Spending Clause argument, the Eleventh Circuit has subsequently held that Section 2000d-7's "plain language manifests an unmistakable intent to condition federal funds on a state's waiver of sovereign immunity" and that there is "no constitutional defect inherent in the explicit state immunity waiver enacted

pursuant to the Spending Clause in Section 2000d-7." *Sandoval* v. *Hagan*, 197 F.3d 484, 493, 494 (11th Cir. 1999). This is in accord with almost every other court of appeals that has addressed the issue. See *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553 (4th Cir. 1999), cert. denied, No. 99-596, 2000 WL 198966 (Feb. 22, 2000); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); see also *Little Rock Sch. Dist.* v. *Mauney*, 183 F.3d 816, 831-832 (8th Cir. 1999) (same, for similar language in Individuals with Disabilities Education Act, 20 U.S.C. 1403).[9] On February 22, 2000, this Court denied a petition for a writ of certiorari presenting the question of Congress's authority to effect the waiver in Section 2000d-7 under its Spending Clause power. *George Mason Univ.* v. *Litman*, No. 99-596, 2000 WL 198966 (Feb. 22, 2000). Because the removal of Eleventh Amendment immunity for Section 504 suits can be sustained on this alternative ground for which further review is not warranted, this Court should deny a writ of certiorari on the second question presented.[10]

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[9] A panel of the Eighth Circuit reached the opposite conclusion in *Bradley* v. *Arkansas Department of Education*, 189 F.3d 745, vacated in pertinent part for reh'g en banc *sub nom. Jim C.* v. *Arkansas Dep't of Educ.*, 197 F.3d 958 (1999). The panel opinion was based on the mistaken premise that the State was required either to accept no federal money or to subject all of its programs in every department to Section 504; the opinion was also based on an unduly narrow understanding of Congress's power under the Spending Clause. The Eighth Circuit granted the United States' petition for rehearing en banc to address the Section 504 Spending Clause holding, and oral argument was heard on January 14, 2000.

[10] Respondents' Disabilities Act claims have importance independent of their Rehabilitation Act claims for two reasons. First, the Disabilities Act governs petitioners' conduct regardless of whether they are recipients of federal financial assistance. See n.8,

CONCLUSION

As to the first question presented, regarding the validity of the abrogation of Eleventh Amendment immunity for Titles I and II of the Disabilities Act, the petition for a writ of certiorari should be granted. As to the second question presented, regarding the validity of the removal of Eleventh Amendment immunity for Section 504 of the Rehabilitation Act, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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supra. Second, the standard for awarding damages under the Rehabilitation Act for failure to reasonably accommodate is unsettled, while Title I plainly authorizes compensatory damages for a failure to reasonably accommodate, unless the employer undertakes "good faith efforts" to accommodate, 42 U.S.C. 1981a(a)(3). Thus, regardless of the ultimate disposition of the Rehabilitation Act claims, the parties have a distinct interest in resolving the dispute over the applicability of the Disabilities Act to petitioners' conduct.